Parliamentary Committees



Mineral and Energy Resources (Financial Provisioning) Bill 2018

Report No. 6, 56th Parliament
Economics and Governance Committee
April 2018

Economics and Governance Committee

Chair	Mr Linus Power MP, Member for Logan
Deputy Chair	Mr Ray Stevens MP, Member for Mermaid Beach
Members	Ms Nikki Boyd MP, Member for Pine Rivers
	Mr Sam O'Connor MP, Member for Bonney
	Mr Dan Purdie MP, Member for Ninderry
	Ms Kim Richards MP, Member for Redlands

Committee Secretariat	
Telephone	+61 7 3553 6637
Fax	+61 7 3553 6699
Email	egc@parliament.qld.gov.au
Technical Scrutiny Secretariat	+61 7 3553 6601
Committee webpage	www.parliament.qld.gov.au/egc

Acknowledgements

The committee acknowledges the assistance provided by the Queensland Treasury and Department of Environment and Science.

Contents

Abbreviations ii

Chair's foreword iii

Recommendations iv

1 Introduction 1
1.1 Role of the committee 1
1.2 Inquiry process 1
1.3 Policy objectives of the Bill 1
1.4 Government consultation on the Bill 2
1.5 Should the Bill be passed? 2

2 Background to the Bill 3
2.1 Current financial assurance and rehabilitation arrangements 3
2.2 Review of current arrangements and identification of reforms 3

3 Examination of the Bill 5
3.1 Financial provisioning scheme 5
3.1.1 Scheme fund and surety account 8
3.1.2 Scheme manager 9
3.1.3 Operation of the scheme 10
3.1.4 Advisory committee 17
3.1.5 Financial assurance for prescribed ERAs 18
3.1.6 Review of decisions 19
3.1.7 Publicly available information 20
3.1.8 Commencement and transitional arrangements 23
3.2 Rehabilitation reforms 24
3.2.1 PRC plans 24
3.2.2 Commencement and transitional arrangements 30
3.3 Container recycling scheme 32
3.4 Administrative, technical and clarifying amendments 32

4 Compliance with the *Legislative Standards Act 1992* 33
4.1 Fundamental legislative principles 33
4.1.1 Rights and liberties of individuals 33
4.1.2 Institution of Parliament 35
4.2 Explanatory notes 35

Appendix A – Submitters 36

Appendix B – Witnesses at public briefing and public hearing 38

Abbreviations

AEC	former Agriculture and Environment Committee
APPEA	Australian Petroleum Production and Exploration Association Limited
Bill	Mineral and Energy Resources (Financial Provisioning) Bill 2018
committee	Economics and Governance Committee
DES	Department of Environment and Science
EA	environmental authority
EP Act	*Environmental Protection Act 1994*
ERA	environmentally relevant activity
ERC	estimated rehabilitation cost
EDO	Environmental Defenders Office
JR Act	*Judicial Review Act 1991*
LS Act	*Legislative Standards Act 1992*
PRC plan	progressive rehabilitation and closure plan
PRCP schedule	progressive rehabilitation and closure plan schedule
QLS	Queensland Law Society
QRC	Queensland Resources Council
QT	Queensland Treasury
QTC	Queensland Treasury Corporation
QTC Report	*Review of Queensland's Financial Assurance Framework*
SSMT	small scale mining tenure

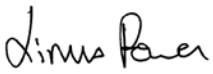
Chair's foreword

This report presents a summary of the Economics and Governance Committee's examination of the Mineral and Energy Resources (Financial Provisioning) Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions and appeared at the committee's public hearing. I also thank our Parliamentary Service staff, and the Queensland Treasury and Department of Environment and Science for their assistance.

I commend this report to the House.



Linus Power MP
Chair

Recommendations

Recommendation 1 **2**

The committee recommends the Mineral and Energy Resources (Financial Provisioning) Bill 2018 be passed.

Recommendation 2 **35**

The committee recommends clause 173 of the Mineral and Energy Resources (Financial Provisioning) Bill 2018 be amended to correct a minor drafting error.

1 Introduction

1.1 Role of the committee

The Economics and Governance Committee (the committee) is a portfolio committee of the Legislative Assembly.[1] The committee's areas of portfolio responsibility are:

- Premier and Cabinet, and Trade
- Treasury, and Aboriginal and Torres Strait Islander Partnerships
- Local Government, Racing and Multicultural Affairs.[2]

The committee is responsible for examining each bill in its portfolio areas to consider the policy to be given effect by the legislation and the application of fundamental legislative principles.[3]

1.2 Inquiry process

The Mineral and Energy Resources (Financial Provisioning) Bill 2018 (the Bill) was introduced into the Legislative Assembly and referred to the committee on 15 February 2018. The committee was required to report to the Legislative Assembly by 20 April 2018.

A previous version of the Bill was introduced into the 55th Parliament on 25 October 2017, and referred to the former Agriculture and Environment Committee (AEC). The former AEC had not completed its inquiry into the 2017 version of the Bill when the Parliament was dissolved on 29 October 2017. The 2017 Bill lapsed when the 55th Parliament was dissolved. The Queensland Treasury (QT) advised the committee that the Bill 'is substantially the same as the lapsed Bill in terms of policy save for a number of minor and technical amendments'.[4]

During its examination of the Bill, the committee:

- invited written submissions from the public, identified stakeholders and subscribers; a list of the 51 submissions received and accepted by the committee is at **Appendix A**
- received a public briefing from the QT and the Department of Environment and Science (DES) on 5 March 2018; a list of witnesses who appeared at the briefing is at **Appendix B**
- held a public hearing on 28 March 2018; a list of witnesses who appeared at the hearing is at **Appendix B**
- requested and received written advice from the QT on the Bill and issues raised in submissions.

Copies of the material published in relation to the committee's inquiry, including submissions, correspondence from the QT and DES and transcripts are available on the committee's webpage.

1.3 Policy objectives of the Bill

The objectives of the Bill are to:

- create the *Mineral and Energy Resources (Financial Provisioning) Act 2018* that establishes a new financial provisioning scheme to manage the State's financial risk in relation to the financial impacts of mineral and energy resource activities
- amend the *Environmental Protection Act 1994* (EP Act) to implement rehabilitation reforms including plans for the progressive closure and rehabilitation of land, and
- delay commencement of the container refund scheme to ensure its successful delivery.[5]

---

1 The committee was established on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) section 88 and the Standing Rules and Orders of the Legislative Assembly (Standing Orders), SO 194.

2 POQA, s 88; Standing Orders, 194, sch 6.

3 POQA, s 93(1).

4 QT, *Departmental Written Brief to Economics and Governance Committee*, p 1.

5 Explanatory notes, p 1; Hon Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships, Record of Proceedings, 15 February 2018, p 102.

1.4 Government consultation on the Bill

The explanatory notes state that 'Government consulted on the drafting of provisions to be included in the Bill with representatives identified by the peak industry and conservation bodies'. The explanatory notes indicate that stakeholder comments 'have been considered in the final preparation of the Bill'.[6]

Some submitters and witnesses raised concerns that while the consultation on potential reforms to financial assurance and rehabilitation frameworks was extensive, consultation on the Bill was limited:

> *We again commend the Treasury and its associated bodies for the work they did. We know there were workshops regionally. When it came to the draft legislation, there was only a couple of days. The consultation process was very thorough and very wide ranging, but when it came to looking at a draft bill it was provided and then an answer requested within only a couple of days, so it is incredibly difficult.*[7]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including the policy objectives it is intended to achieve, and consideration of the information provided by the QT, DES, submitters and witnesses, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Mineral and Energy Resources (Financial Provisioning) Bill 2018 be passed.

6 Explanatory notes, p 11; Department of Environment and Heritage Protection, *Mining rehabilitation reforms*, www.ehp.qld.gov.au/management/env-policy-legislation/mining-rehabilitation-reforms (accessed 27 March 2018).

7 QLS, public hearing transcript, Brisbane, 28 March 2018, p 6.

2 Background to the Bill

2.1 Current financial assurance and rehabilitation arrangements

Mining activities in Queensland are regulated through a mining authority, such as a mining lease, and an environmental authority (EA). A mining authority provides an operator with a right to enter land and undertake mining activities, while an EA requires the operator to manage the environmental impact of mining activities to minimise the environmental harm and to return the disturbed land to a useful purpose.

Applications for an EA must contain information on the rehabilitation plans for the site, and the EA may then be made subject to conditions about rehabilitating the land. However not all commitments made by the operator in the application are translated into a condition on the EA. Where conditions about progressive rehabilitation are imposed, they are generally framed in terms of 'when areas become available' or 'when practicable' rather than explicit time based requirements.[8] Information on rehabilitation progress is provided over the life of the mine through 'annual returns' and 'plans of operation'.[9]

The holder of an EA, or a small scale mining tenure (SSMT),[10] is required to provide financial assurance to the State to mitigate the risk to the community and the State in circumstances where the operator does not meet their rehabilitation or environmental management obligations.

The amount of financial assurance required is based on an assessment of the likely cost for a third party to undertake the rehabilitation work; determined 'by calculating the size and nature of disturbance as well as the rehabilitation undertaken on the site'.[11] Operators can minimise the amount of surety they are required to provide by undertaking progressive rehabilitation, reducing the total liability for the site. However, there is 'little evidence that this incentive has resulted in greater rates of [rehabilitation] activity'.[12]

An operator cannot commence resource activities until the financial assurance has been provided, and the surety must stay in place for the life of the operation. Financial assurance is generally provided by bank guarantee, but may be provided in cash with the government's consent. [13]

2.2 Review of current arrangements and identification of reforms

Following a number of cases where operators were unable to meet their rehabilitation obligations, and growing concerns about the quantity and quality of rehabilitation being undertaken, the Queensland Treasury Corporation (QTC) was commissioned to review the financial assurance arrangements and identify possible improvements to rehabilitation performance.

QTC's report, *Review of Queensland's Financial Assurance Framework* (QTC Report), was published in May 2017 with two discussion papers; the *Financial Assurance Framework Reform* and the *Better Mine Rehabilitation for Queensland*.[14]

---

8 Queensland Government, *Better mine rehabilitation for Queensland: discussion paper*, April 2017, pp 44-45.

9 Queensland Government, *Better mine rehabilitation for Queensland: discussion paper*, April 2017, p 45.

10 A small scale mining tenure applies to mining activity carried out under a mining claim for corundum (a type of aluminium oxide) or precious stones on an area of not more than 20ha, or an exploration permit for minerals other than coal on area of not more than 4 sub-blocks. The activity must not cause significant disturbance to more than 5ha for a mining claim and 1000m2 for an exploration permit and must not be in a watercourse or riverine area, a designated precinct in a strategic environmental area, or within a prescribed distance of an environmentally sensitive area (*Environmental Protection Act 1994*, sch 4).

11 Queensland Government, *Better mine rehabilitation for Queensland: discussion paper*, April 2017, p 8.

12 Queensland Government, *Financial assurance framework reform: discussion paper*, 2017, p 9.

13 Queensland Government, *Financial assurance framework reform: discussion paper*, 2017, p 15.

14 Explanatory notes, pp 1-2.

During the consultation period the Financial Assurance Project Management Office held stakeholder consultation meetings, and received submissions (497 submissions were received for *Financial Assurance Framework Reform* and 521 submissions were received for *Better Mine Rehabilitation for Queensland*). A further discussion paper, *Financial Assurance Review – Providing Surety* and the *Mines Land Rehabilitation Policy* was published in September 2017.[15]

The QTC Report identified the following key disadvantages with the current system:

- if financial assurance held is less than the rehabilitation cost, the State has no source of funding for the shortfall
  - reasons the financial assurance held may be less than the rehabilitation cost include the availability of discounts to operators based on specific criteria, the underestimation of the rehabilitation cost, and operators who delay the process to update their financial assurance
- the cost of bank guarantees is onerous for small to mid-sized operators, in terms of bank fees and the balance sheet impact, and there are indications that the costs will increase
- the rate of progressive rehabilitation is falling behind growth in the disturbance of the land, increasing the financial risk the State is exposed to, and
- the State does not have a good understanding of its risk exposure.[16]

In response to the QTC Report, the QT advised that government is committed to a reform package to:

- deliver a high level of environmental performance
- protect the State's financial interest
- not present a disincentive to investment in the resources sector, and
- provide an outcome that satisfies community expectations.

The Bill proposes to implement two components of the reform by establishing a new financial provisioning scheme and implementing mining rehabilitation reforms.[17]

The explanatory notes state that the majority of stakeholders 'generally supported the objectives of the reform package and have accepted the case for reform'.[18] The notes also state that the proposed framework established by the Bill incorporates feedback received during the consultation process.

[15] Explanatory notes, p 10; QT, *Departmental Written Brief to Economics and Governance Committee*, attachment 7.

[16] QTC, Review of Queensland's Financial Assurance Framework, Final Report April 2017; QT, *Departmental Written Brief to Economics and Governance Committee*, p 2.

[17] QT, *Departmental Written Brief to Economics and Governance Committee*, p 2.

[18] Explanatory notes, p 10.

3 Examination of the Bill

3.1 Financial provisioning scheme

The Bill proposes to replace the current financial assurance framework for resource activities under the EP Act with a new financial provisioning scheme. The new scheme will provide government with access to funds for environmental management and rehabilitation activities where an operator does not comply with its obligations, and for funding other resource related activities such as rehabilitating abandoned mines and operating sites and research into rehabilitation techniques.[19]

The explanatory notes state that the proposed new scheme 'does not change the environmental or rehabilitation obligations … but is designed to protect the State's financial interests'.[20]

Under the proposed new scheme an EA holder is required to either make a contribution to the scheme fund or pay a surety (in the form of a bank guarantee, insurance bond issued by a prescribed insurer or cash), depending on the estimated rehabilitation cost (ERC) for the EA and, if applicable, the risk category assigned to the EA. An SSMT holder is required to give surety.[21]

The Bill proposes that the scheme fund will operate on a pooled basis, rather than under the current arrangements where assurance is provided for each EA, and may only be applied for rehabilitation activities relating to that EA. Operating a pooled fund is intended to avoid the risk of funding shortfalls and require holders to pay only an annual contribution.[22]

The explanatory notes state that the new financial provisioning scheme seeks to be substantially self-funded. To achieve this, the Bill provides for investment of the scheme fund and for the collection of fees from participants in the scheme 'for cost recovery purposes'.[23]

Stakeholder views and the QT response

The majority of submitters expressed general support for reforms to the financial provisioning framework,[24] however some concerns were raised.

Details for the financial provisioning scheme

A number of submitters and witnesses raised concerns regarding the lack of available detail for how the new financial provisioning scheme will operate. For example, BHP submitted:

> *We also wish to reiterate our concerns regarding the lack of detail released by the Queensland Government at this point in time, as the Bill does not provide mine operators with enough information to properly understand the potential cost implications of this framework.*[25]

Similarly, the Queensland Resources Council (QRC) stated:

> *While of itself, the financial provisioning components of the Bill make sense and are not of any surprise, it is the numbers that will ultimately make the difference between the sector's support or not. Unfortunately, Government only appears willing to communicate these post the Bill's Committee process.*[26]

---

19 Explanatory notes, p 2; Department of Environment and Heritage Protection, *Mining rehabilitation reforms*, www.ehp.qld.gov.au/management/env-policy-legislation/mining-rehabilitation-reforms (last accessed 27 March 2018).

20 Explanatory notes, p 2.

21 Bill, cls 25, 56; Explanatory notes, pp 16, 25.

22 Explanatory notes, p 2.

23 Explanatory notes, p 5.

24 See for example submission 1, 3, 6, 17, 22, 34, 36 and 42.

25 Submission 31, p 4.

26 Submission 26, p 5.

In response to concerns regarding the absence of details about the operation of the financial provisioning scheme, the QT advised:

> *Consultation on a draft regulation and draft scheme manager guidelines is expected to occur soon.*
>
> *...*
>
> *While formal consultation on these documents is still to occur, substantial information on these elements of the scheme have already been made available to stakeholders.*
>
> - *The QTC Report, Review of Queensland's Financial Assurance Framework (commissioned by the government and released publicly with the Financial Assurance Framework Reform Discussion Paper in May 2017), proposed contribution rates for pooled fund.*
> - *The commissioned report prepared by KPMG and Australia Ratings, Design of the Risk Assessment Process for the Financial Assurance Scheme was released publicly by the Government in September 2017. This report will form the basis for the statutory guidelines on the risk category allocation process and the determination of the relevant holder.*
> - *The Financial Assurance Review – Providing Surety discussions paper and the related consultation report, address the matters that will be covered by the prescribed insurer requirements and the forms of surety guideline*
> - *Informal consultation has been held with stakeholders on proposed fees being considered prior to formal consultation and the review of the ERC calculator.*
>
> *…*
>
> *Given the extent of information available about these aspects of the reforms covered by the Bill, it is not necessary to have the draft regulations and statutory guidelines to determine that the Bill will achieve an improved situation for the resources industry as a whole, improved environment outcomes and reduce the rehabilitation risk to the State from resource company failure.*[27]

Costs of the new financial provisioning scheme

Some submitters expressed concern that the new financial provisioning scheme may result in significant cost increases. For example, the Australian Petroleum Production and Exploration Association Limited (APPEA) submitted:

> *…analysis undertaken by APPEA and our members suggest that costs associated with financial assurance may increase several times over under the proposed fund.*[28]

Similarly, Origin Energy Limited submitted:

> *…the Bill may result in significant cost increases for APLNG and consequently Origin as a 37.5% shareholder, over and above the current process of obtaining bank guarantees.*[29]

A number of submitters suggested that the oil and gas industry should be excluded from the financial provisioning fund,[30] 'due to the strong impediment to development that it is likely to create through substantial cost increase'.[31] It was also asserted that the need to rely on financial assurance to ensure rehabilitation occurs for this industry is very low.[32]

---

27 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 2.

28 Submission 35, p 2.

29 Submission 44, p 1.

30 See for example submissions 35, 40, 43 and 44.

31 Submission 40, p 2.

32 Submissions 44, 67.

Pooled fund approach

BHP expressed concern about potential 'moral hazards' associated with the proposed scheme fund, submitting that a pooled fund:

> *…may make certain mine operators less motivated to pursue high-standard environmental and rehabilitation outcomes due to the assumption that the associated costs will be absorbed by the fund in certain circumstances.*
>
> *…*
>
> *…Queensland's mine operators are essentially being asked to pay for rehabilitation twice: once for their own operations and again for the entities which draw upon the fund.*[33]

In response to this concern, the QT advised:

> *QT does not share the view that contribution to the scheme fund creates the 'moral hazard' that holders, after contributing, will be less inclined to carry out their rehabilitation obligations… nothing in the scheme reduces the holder's obligations under the EP Act to rehabilitate mined land.*[34]

Forms of surety

A number of submitters expressed support for allowing insurance instruments as a form of surety.[35]

BHP, while supporting the proposed use of insurance bonds to provide surety, raised some concern regarding 'which insurers (or categories of insurer) would qualify' and be approved as prescribed insurers. BHP also raised an issue regarding 'how the approved form of security will work in terms of any requirement to name all holders on the surety', submitting:

> *BHP has collaborated extensively with the Queensland Government to develop a suitable form of surety that enables two or more UJV [Unincorporated Joint Venture] participants to provide a single joint surety instrument involving two, or more, issuers (banks/insurers). This approach should be retained as an option when considering approved forms of surety.*[36]

However, some submitters expressed concerns regarding the forms of surety proposed by the Bill. For example, The Trustee for the Wilson Family Discretionary Trust submitted:

> *Despite the clear direction of Queensland Treasury moving for a more flexible and less burdensome environment for industry, it has still created a very prescriptive form of surety. That is, the surety can ONLY be in 1 of 3 forms.*
>
> *…*
>
> *If we are looking to achieve alternative ways to reduce the risk to government, and to avoid creating monopolies through mandatory prescription, a better model, would be allow the experts in Queensland Treasury, evaluate any form of surety to see whether it achieves government purposes.*[37]

In response to these issues, the QT advised:

> *The Bill seeks to expand the range of forms of surety that the scheme manager can approve by including insurance bonds, in addition to bank guarantees and cash.*
>
> *…*

---

33 Submission 31, p 3.

34 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 5-6.

35 See for example submissions 6, 26, 31

36 Submission 31, p 5.

37 Submission 46, pp 4-5.

The proposed amendment to provide approval for unspecified forms of surety … in QT's view, is unlikely to yield greater range of forms of surety given the considerations that would apply to such a decision under the Financial and Performance Management Standard 2009 and the Financial Accountability Handbook. It is also noted that providing clear parameters to acceptable forms of financial assurance provides industry participants with a greater degree of certainty and promotes the efficient financing and approval of projects…[38]

3.1.1 Scheme fund and surety account

Scheme fund

The Bill provides for the establishment of the scheme fund, and sets out the requirements for how the fund accounts are to be kept and how amounts must be deposited.

Amounts paid into the scheme fund include contributions to the fund under the requirements of the proposed new Act, fees paid under the proposed new Act, amounts advanced by the Treasurer, amounts earned as interest on the cash surety account or scheme fund, and amounts paid to the chief executive (environment) to take action to prevent or minimise harm or rehabilitate or restore the environment that the chief executive (environment) subsequently recovers from the operator.

Payments made to the fund are controlled receipts and are not part of consolidated revenue. An amount is payable from the fund only for the purposes of the Act or to repay an amount advanced to the fund by the Treasurer.[39]

The fund threshold is $450 million unless an alternative amount is prescribed by regulation.[40]

Stakeholder views and the QT response

Some submitters expressed concern that the fund threshold, $450 million is too high.[41] For example, Lock the Gate Alliance and the Environmental Defenders Office (EDO), in a joint submission, stated:

…the maximum 'fund threshold' contribution to the pool should be reduced from $450m to $350m to reduce the pools (sic) exposure to a material default.[42]

In response to these concerns, the QT advised that '$450M is considered to be the appropriate value for fund threshold for the commencement of the scheme':

The fund threshold amount of $450M has been determined as approximately 5% of the total State estimated rehabilitation cost. This figure was based upon independent advice procured during the QTC Financial Assurance Review.[43]

Some concerns were also raised regarding the potential use of the fund for purposes unrelated to rehabilitation. For example, Peabody Energy Australia submitted that the purpose of the fund:

…includes references that would enable the State to access funds for 'preventing or minimising environmental harm', 'securing compliance with an authority' and 'rehabilitating or restoring the environment'. These purposes are broad and raises a concern previously communicated by Peabody that funds contributed for rehabilitation purposes may be used for unrelated purposes. We would like to see this more clearly and narrowly defined to limit any potential use of funds to rehabilitation only.[44]

---

38 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 17.

39 Bill, cl 24; Explanatory notes, p 16.

40 Bill, cl 11; Explanatory notes, p 14.

41 See for example submissions 16 and 31.

42 Submission 16, p 12.

43 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 11.

44 Submission 42, p 2.

In relation to the use of the fund the QT advised at the public briefing:

> *The bill is very clear and specific in terms of the purposes for which money from that fund can be used. It is solely for a cost associated with the scheme, for rehabilitation works that have to be made by the particular chief executives... there is no allowance within the bill for broad expenditure examples that you could spend it on in terms of other functions of government.*[45]

Cash surety account

The Bill also requires the establishment of a separate cash surety account and sets out the requirements for how the fund accounts are to be kept and how amounts in the account may be invested.

All cash amounts paid as surety for an EA or SSMT must be deposited into the account.

An amount is payable from the account only as prescribed by the proposed new Act to release a surety, to pay a claim or realise a surety, or to transfer interest earned on the account to the scheme fund.[46]

3.1.2 Scheme manager

To manage the new financial provisioning scheme, the Bill provides for the appointment of a scheme manager. The manager is appointed by the Governor in Council for a term of up to five years.[47]

The functions of the scheme manager are:

- managing the scheme
- allocating and reviewing the risk categories of EAs, and
- setting investment objectives for the scheme fund and establishing investment strategies and policies to achieve the objectives.

The scheme manager must ask for advice from the Long Term Asset Advisory Board,[48] or another entity nominated by the Treasurer, when setting investment objectives and establishing investment strategies and policies.[49]

Keeping the Minister informed

The Bill provides that the scheme manager must keep the Minister reasonably informed of the operations, financial performance and financial position of the scheme.[50]

The scheme manager must give the Minister an annual report on the administration of the proposed new Act and the scheme during the financial year, including:

- information relating to an investigation of the actuarial sustainability of the scheme, such as the actuary's opinions, the scheme manager's recommendations and any action taken in response to the recommendations, and
- a summary of information received from the public about the effectiveness of the scheme.

The report must be published on the QT website as soon as practicable after it is given to the Minister.[51]

Actuarial sustainability of the scheme

The Bill requires the scheme manager periodically investigate the actuarial sustainability of the scheme and provide a report to the Minister.

---

45 Public briefing transcript, Brisbane, 5 March 2018, p 3.

46 Bill, cl 25; Explanatory notes, p 16.

47 Bill, cls 12-13; Explanatory notes, p 14.

48 The Long Term Asset Advisory Board has the power to manage the sufficiency of the funding of long term assets and set investment objectives and strategies, set the investment structure and monitor investment performance of long term assets.

49 Bill, cl 21; Explanatory notes, p 15.

50 Bill, cl 71; Explanatory notes, p 27.

51 Bill, cl 72; Explanatory notes, p 28.

The scheme manager may ask an actuary for a report including the actuary's opinion about whether:

- the scheme fund is adequate to achieve the main purposes of the Act
- the fund threshold should be changed
- the number of risk categories should be changed
- the rate of contribution to the scheme fund should be changed
- the assessment and administration fees are adequate to meet the cost of operating the scheme.

An actuarial investigation must be carried out five years after commencement of the new Act, and every three years after the date of the preceding report.[52]

3.1.3 Operation of the scheme

Under the proposed new scheme an EA or SSMT holder is required to either make a contribution to the fund or pay a surety, depending on the ERC and, if applicable, the risk category assigned to the EA.[53]

Estimated rehabilitation cost

Under the proposed new financial provisioning scheme the amount of contribution to the scheme fund or surety required will be determined with reference to the ERC. The ERC is the projected cost for the relevant period[54] of rehabilitating the land and preventing or minimising harm, or rehabilitating or restoring the environment. The DES, as the administering authority for the EP Act calculates the ERC and provides the ERC decision to the scheme manager.[55]

Resource activities must not be carried out under an EA unless an ERC decision is in effect for the activity and the EA holder has paid the required contribution or surety.[56]

An EA holder may apply for an initial ERC decision prior to commencing resource activities and must subsequently apply for a new ERC decision at least three months[57] before the expiry of the relevant ERC period. The holder of the EA must also apply for a new ERC if:

- there is an increase in the likely maximum amount of disturbance to the environment
- there is a change relating to the resource activity that may result in an increase to the ERC
- the EA holder's annual return states there has been a change that may affect the ERC
- the administering authority approves the amalgamation of two or more EAs or de-amalgamates an EA.

If the EA holder makes an application for a new ERC decision in accordance with the requirements of the Act, but a new ERC decision has not been made before the expiry of the relevant ERC period, the current ERC decision remains in effect until the application is decided.[58]

---

52 Bill, cl 72; Explanatory notes, p 28.

53 Bill, cls 25, 56; Explanatory notes, pp 16, 25.

54 The relevant period is a period of 1 to 5 years stated in the application for an estimated rehabilitation cost decision if a progressive rehabilitation and closure plan schedule applies or the activity is a petroleum activity that is an ineligible environmentally relevant activity; the plan period if a plan of operations applies; or the total period during which the resource activity is likely to be carried out under the EA.

55 Bill, cl 173; QT, *Departmental Written Brief to Economics and Governance Committee*, attachment 4.

56 Bill, cl 173 (s 297); Explanatory notes, pp 67-68.

57 For an EA for a petroleum activity, the application for a new ERC decision must be made at least 20 days before the relevant ERC period ends.

58 Bill, cl 173 (ss 298-305); Explanatory notes, pp 68-71.

Stakeholder views and the QT response

Some submitters and witnesses raised concerns about the definition of the ERC, and submitted that the ERC should not include costs of preventing or minimising environmental harm.[59] For example, Peabody Energy Australia submitted:

> *…the definition of 1 estimated resource cost' (ERC) at clause 8 of the Bill is broad, and includes the amount of the estimated costs of 'preventing or minimising environmental harm, or rehabilitating or restoring the environment, in relation to the resource activity'.*
>
> *Nowhere in the purpose of the Bill is there any justification for including as part of the estimated rehabilitation cost the costs of preventing or minimising environmental harm. This is not the role of the ERC, or of the fund contribution payments resulting from it.*
>
> *The cost of the ERC should be limited to rehabilitation costs only.*[60]

In response to the concerns regarding the scope of the ERC, the QT advised that the intention of the provision is to retain the existing elements of the current provision in the EP Act in determining the amount of the contribution or surety to be provided.

> *The drafting for Clause 8 maintains the two elements in the current legislation but has changed the wording from the existing 295 to ensure consistency with drafting in other sections of the Bill, including the main purpose of the Act (e.g. Clause 3). Costs associated with managing the environment could include managing contaminated water on a site to prevent environmental harm in adjacent waterways.*
>
> *The intent of the drafting is to continue to ensure that costs associated with rehabilitation or 'environmental management' (actions to prevent or minimise environmental harm, or rehabilitate the environment) are included in the calculation for the estimated rehabilitation cost. This is particularly important with the introduction of non-use management areas by the PRC plans and the difference in 'rehabilitation milestones' and 'management milestones'.*
>
> *Costs associated with management milestones should be included in the calculation, not excluded because it is not defined as 'rehabilitation'.*[61]

Further, the QRC raised concerns regarding the calculator for determining the ERC:

> *QRC is aware that the Government is attempting to get updated versions of both the Petroleum and Gas and Mining calculators ready for the 1 July 2018 start date of the Scheme. However, given the loss of company-owned calculators, there needs to be an ongoing process, adequately resourced by Government, to regularly (e.g. no less than every two years) update the Government calculators to keep them relevant to the times and technology...*
>
> *QRC asks the Committee to seek clarification from Government as to how they will ensure the ERC calculators will be kept up to date. This includes adequate resourcing of regular reviews.*[62]

In response to the QRC's concern, the QT advised:

> *DES is committed to providing a calculator which includes contemporary rehabilitation rates. The first calculator was released in 2014, with a revised version provided in 2017. The next version is due for release to be used from July 2018.*
>
> *The current review reiterates the Government's commitment to ensuring contemporary and up to date rates.*[63]

---

59 See for example submissions 26, 32, 42.

60 Submission 42, p 3.

61 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 10.

62 Submission 26, p 18.

63 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 38.

Risk categories

The Bill provides that the scheme manager must allocate an EA a risk category – very low, low, moderate or high – if the ERC for the EA is $100,000 or more (or an amount prescribed by regulation).

In deciding the risk category the scheme manager must consider the probability of the State incurring costs because the EA holder does not prevent or minimise harm or rehabilitate or restore the land and the scheme manager guidelines and may consider any other relevant matter. In determining the financial risk to the State, the scheme manager must consider the financial soundness of the EA holder and the scheme manager guidelines, and may consider the characteristics of the resource project and any other relevant matter.[64]

Prior to making a final decision about the risk category the scheme manager must give the EA holder notice of the proposed risk category, the reason for the proposed allocation and whether a contribution to the scheme fund or a surety would be required. The EA holder may make submissions to the scheme manager, within 20 business days of being given notice of the proposed risk category, if they disagree with the risk category proposed.[65]

As soon as practicable after making the risk category allocation the scheme manager must give the EA holder a notice stating the allocation, the day it was decided, the amount of the contribution or surety required and when it must be provided, and the assessment fee and when it must be paid.[66]

Annual review

The risk category must be reviewed annually, and the scheme manager may confirm or change the category. The review must be within 30 business days of the expiry day for the EA.

In line with the initial allocation process, when reviewing the risk category the scheme manager must consider the probability of the State incurring costs because the EA holder does not prevent or minimise harm or rehabilitate or restore the land and the scheme manager guidelines and may consider any other relevant matter. In considering the financial risk to the State, the scheme manager must consider the financial soundness of the EA holder and the scheme manager guidelines, and may consider the characteristics of the resource project and any other relevant matter.[67]

The scheme manager must give the EA holder notice of the proposed confirmation or change to the risk category and allow them to make submissions within 20 business days of being given notice of the reviewed risk category if they disagree with the review decision.[68]

As soon as practicable after making a decision the scheme manager must give the EA holder a notice stating the reviewed risk category allocation, the day it was decided, the amount of the contribution or surety required and when it must be provided, and the assessment fee and when it must be paid.[69]

Review when EA holder changes

The scheme manager may also review the risk category allocation on application, or on their own initiative, if the holder or one of the holders of the EA changes or is proposed to change.[70]

An EA holder must notify the scheme manager if an application is made to register the transfer of a resource authority relating to the EA to another holder of the EA or another entity, or an entity starts or stops controlling the EA holder, or starts or stops being a subsidiary of a corporation under the *Corporations Act 2001*.[71]

64 Bill, cl 27; Explanatory notes, p 3.
65 Bill, cl 28; Explanatory notes, p 17.
66 Bill, cl 31; Explanatory notes, p 18.
67 Bill, cl 38; Explanatory notes, p 20.
68 Bill, cl 39; Explanatory notes, p 20.
69 Bill, cl 41; Explanatory notes, p 20.
70 Bill, cls 32-37; Explanatory notes, pp 18-19.
71 Bill, cl 42; Explanatory notes, p 21.

Stakeholder views and the QT response

Some submitters and witnesses raised concerns about what the scheme manager must consider when making risk category allocation decisions. For example, Peabody Energy Australia submitted:

> *The risk categorisation clauses do not compel the Scheme Manager to consider the financial soundness of the parent corporation or the characteristics of the resource project...*
>
> *Additionally, the weighting that parent company financials will be given is not clear. It is well known that Peabody Australia's parent successfully exited Chapter 11 bankruptcy protection processes in April 2017. Peabody Australia's Australian assets were quarantined from this process. However, based on the Bill it is likely that the Scheme Manager will consider the parent company position in forming its opinion on what risk category to assign to Peabody Australia's operations. Its parent company having successfully completed the Chapter 11 process, Peabody Australia submits it should not be penalised by being assigned to a higher risk category.*[72]

Comparably, the QRC submitted 'there is a discretion to consider the characteristics of a resource project':

> *This means that there is no requirement for the Scheme Manager to take notice of progressive rehabilitation as a key component in the consideration by the State of their potential to be exposed to a company not meeting its rehabilitation requirements. The other key factor that will not be required to be considered is the remaining life of the resource, which again plays a key role in assessing the Government's realistic risk exposure.*
>
> *…*
>
> *Subjective discretion results in substantial uncertainty for the sector in analysing implications of the new framework now and in the future.* [73]

The QT's response to issues raised in submissions included advice that:

- *Subject to the particular circumstances of each authority, it is a matter for the scheme manager to consider whether or not to take into account the resource project characteristics when making an allocation decision. However, there are reasonable circumstances when the resource project characteristics may not be relevant, for example, for exploration projects or those in care and maintenance.*
- *The Bill does not limit the criteria which is considered in making a risk category allocation...*
- *As the criteria may change over time, for instance due to changing market factors, it is appropriate that the criteria for making a risk category allocation is in the statutory guideline rather than the legislation.*[74]

Specifically on the issue of whether consideration of the financial soundness of a parent company should be discretionary, the QT advised:

> *There may be some reasonable circumstances where it is not necessary for the scheme manager to consider the financial soundness of a parent (for example, where the subsidiary company has a sufficiently high public credit rating or where the parent company is based off-shore in a jurisdiction where there may be difficulties in enforcing environmental obligations). In such situations, it would be an administrative burden on the scheme manager and the company to collect financial information from the parent when it is not needed.*[75]

---

72 Submission 42, p 4.

73 Submission 26, pp 8-9.

74 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 12-13.

75 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 14.

When a contribution or a surety is required

Under the proposed new scheme, an EA holder must pay an annual contribution to the fund if:

- the EA has a risk category of very low, low or moderate and the scheme manager does not decide to require a surety rather than a contribution in order to preserve the financial viability of the fund, or
- following an annual review, the EA is allocated a risk category of high but has for four years immediately preceding the review had a risk category of very low, low or moderate and the scheme manager is satisfied the holder is not reasonably able, within 12 months, to give a surety.[76]

The amount of the contribution to the fund is generally calculated by multiplying the ERC for the EA by the prescribed percentage for the EA (prescribed by regulation). The contribution must be paid within 30 business days after the initial risk category is allocated, the day the risk allocation is changed because of a change to the EA holder or the day of the annual review for the EA.[77]

The EA holder must instead give a surety if:

- the ERC is less than $100,000 (or an amount prescribed by regulation)
- the EA has a risk category of high
- the EA has a risk category of very low, low or moderate but the scheme manager decides that to preserve the financial viability of the fund the holder must give a surety rather than make a contribution (this may occur where the ERC for a number of EAs held by one operator exceeds the fund threshold)
- it is a prescribed condition of a SSMT.[78]

The amount of the surety is the total ERC amount for the EA, or for a SSMT the amount prescribed by regulation. The surety for an EA must be give within 30 business days after the initial risk category is allocated, the day the risk allocation is changed because of a change to the EA holder, the day of the annual review for the EA or the decision that a surety must be given to preserve the fund. The surety for a SSMT must be given before any activity is carried out under the tenure.[79]

Additional surety must be given for an EA if within one year of giving the surety the ERC increases. The additional surety must be given within 30 business days after the ERC increases.[80]

An EA holder must pay an annual contribution and give a surety if the EA has a risk category of very low, low or moderate but the ERC is more than the fund threshold. The contribution is calculated by multiplying the fund threshold by the prescribed percentage, and the surety is the difference between the contribution to the fund and the ERC.[81]

Stakeholder views and the QT response

It was suggested by some submitters that there should be an option to 'opt out' of contributing to the scheme fund and instead provide surety. For example, Peabody recommended that:

> *Parties are afforded the opportunity to opt-out of the Fund, for example if it is likely to be significantly disadvantaged by the costs of the fund, and be able to provide the required security through the provision of a bank guarantee or surety bond.*[82]

76 Bill, cl 46; Explanatory notes, p 22.
77 Bill, cl 47; Explanatory notes, pp 22-23.
78 Bill cls 53-45, 96; Explanatory notes, p 3.
79 Bill, cl 55; Explanatory notes, pp 24-25.
80 Bill, cl 57; Explanatory notes, p 25.
81 Bill, cl 49; Explanatory notes, p 23.
82 Submission 42, p 2.

Similarly BHP submitted:

> *…that companies that can demonstrate adequate financial assurance should have the option of opting out of participation.*[83]

In response to these issues raised in submissions, the QT advised:

> *The reform has been designed to not be a disincentive to industry. It is expected that the contribution rates for the scheme fund will be broadly in line with existing costs to industry... While the impact on individual projects and companies may vary depending on individual arrangements with existing surety providers, companies that provide a contribution to the scheme fund will receive a balance sheet relief compared to existing surety arrangements.*[84]

And:

> *The gas industry is required to provide financial assurance for their projects covered by an environmental authority for the same reasons as other resource companies.*[85]

The QT further advised:

> *An opt-in / opt-out arrangement is not considered appropriate for the scheme fund, due to the potential for adverse selection which could skew the risk of the pool, substantially increasing the risk to the State. The scheme has been designed to be broadly comparable with costs currently faced by industry for surety provision, and will allow balance sheet relief for companies that contribute to the scheme fund.*[86]

Payments from the scheme fund

The Bill provides that the chief executive (environment), chief executive (mineral resources), chief executive (petroleum), and chief executive (resources) may claim amounts from the scheme fund for costs and expenses relating to:

- taking action to prevent or minimise environmental harm
- rehabilitating or restoring the environment
- securing compliance with an EA or condition of an SSMT
- authorising a person to carry out rehabilitation activities at an abandoned mine
- authorising a person to carry out remediation activities at abandoned operating plant
- research that may contribute to the rehabilitation of land.[87]

Before making a request relating to an abandoned mine or research about rehabilitation techniques, the chief executive making the request must consult with the advisory committee.[88]

The scheme manager must authorise payment of the claim unless payment would adversely affect the financial viability of the fund.[89]

Under the new scheme, a refund of a pro rata amount of a contribution may be given if the holder of an EA changes and the new holder pays the contribution or gives surety.[90]

---

83 Submission 31, p 3.

84 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 5.

85 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 4-5.

86 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 4.

87 Bill, cls 63, 173 (s 316G); Explanatory notes, p 26, 76.

88 Bill, cl 64; Explanatory notes, p 26.

89 Bill, cl 65; Explanatory notes, p 26.

90 Bill, cl 50; Explanatory notes, p 23.

Claiming on or realising a surety

The Bill provides that if the chief executive (environment) incurs costs and expenses to prevent or minimise harm, rehabilitate or restore the environment or secure compliance with an EA or condition of a SSMT the entity may make a claim on a surety for that amount (or the amount of the surety if the surety is less than the amount claimed).[91]

Before asking the scheme manager for payment of costs and expenses the chief executive (environment) must give the entity written notice outlining the details of the proposed action, the amount to be requested from the scheme manager, and inviting the entity, within a period of at least 20 days, to make written representations about why the surety should not be claimed or realised.[92]

If after considering any representations, the chief executive (environment) makes a claim, the scheme manager must give the amount claimed or realised.[93] If all or part of a surety is claimed, and a surety is still required, the holder of the EA or SSMT must replenish the surety to the amount held before it was claimed.[94]

Under the new scheme a surety must be released if it is replaced with another surety, or is no longer required because a contribution to the scheme fund is required such as if the risk category is changed. The scheme manager may release a surety if they are satisfied a claim will not be made on the surety under the EP Act for payment of cost and expenses.[95]

Fees

The Bill proposes the following prescribed fees:

- an assessment fee - payable if the scheme manager makes a risk allocation decision
- an administration fee - payable if a surety relates to an EA with an ERC of less than $100,000, a SSMT, or the replacement of a surety.[96]

Scheme guidelines

The Bill provides that the scheme manager may make guidelines about the operation of the scheme, including about:

- making risk category allocation decisions
- assigning authorities to a relevant holder
- making decisions to require an EA holder to give a surety, rather than pay a contribution, to preserve the financial viability of the scheme fund
- approving the terms and conditions of a surety.[97]

Stakeholder views and the QT response

The majority of submitters and witnesses did not make representations about the requirement for the scheme manager to make guidelines.

The QLS submitted that it supported the development of guidelines:

> *QLS welcomes this requirement as it infers decisions made by the scheme manager in the exercise of these powers will be governed by guiding principles to ensure consistency in their application and to afford affected parties with adequate certainty of how a project will be classified...*[98]

91 Bill, cls 67, 173 (s 316G); Explanatory notes, pp 27, 76.
92 Bill, cl 173 (ss 316E, 316F); Explanatory notes, p 75.
93 Bill, cl 65; Explanatory notes, p 26.
94 Bill, cl 69; Explanatory notes, p 27.
95 Bill, cl 58; Explanatory notes, p 25.
96 Bill, cls 60, 61; Explanatory notes, pp 25-26.
97 Bill, cl 70; Explanatory notes, p 27.
98 Submission 9, p 2.

However, the QLS suggested that the requirement to make guidelines should be mandatory.

In response to the suggestion by the QLS, the QT advised:

> *The scheme manager must make a statutory guideline in relation the making of allocation decisions for authorities 27(2)(iii). While the other statutory guidelines are not mandatory, it is intended that statutory guidelines for all the items listed under clause 70 will be made by the scheme manager for scheme commencement. In the future, there may be circumstances where some of these guidelines are no longer relevant.*[99]

3.1.4 Advisory committee

The Bill requires the chief executive to establish an advisory committee to give advice to the scheme manager about the scheme's operation and to entities requesting payments from the scheme fund relating to an abandoned mine or research about rehabilitation techniques.

The advisory committee must consist of at least five qualified persons, including at least one person nominated by an organisation representing environmental interests, and one person nominated by an organisation representing the interests of the mineral and energy resources sector. The Minister must appoint one of the members as the chairperson.

A member of the advisory committee is not entitled to be paid expenses or remuneration.[100]

Stakeholder views

A number of submitters suggested that the size of the advisory committee should be increased and made representations regarding the committee membership. For example the QRC submitted:

> *Given the focus on the role of Fund earnings to be provided to the Abandoned Mine Lands Program (AMLP), QRC suggests that the Committee size, as outlined in Clause 83, is too small and should have two representatives from the resources sector to cover both petroleum and gas and mining.*
>
> *QRC requests the Committee recommend the Advisory Committee is expanded in the legislation to specifically require the representation of two resources sector representatives.*[101]

Similarly, APPEA submitted:

> *The Bill specifies that the Committee must include a person representing environmental interests and a person representing the mineral and energy resources sector.*
>
> *We submit that the mining and petroleum sectors are fundamentally different industries. With over $70 billion invested in Queensland petroleum projects there is a clear rationale for separate petroleum industry representation on the Committee and we request that the Bill be amended to provide for this.*[102]

Submitters also requested further details regarding the role and operation of the advisory group:

> *QRC asks the Committee to seek advice from the Government for a Terms of Reference for the Committee and greater detail on regarding its role and operating rules.*[103]

---

99 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 19.

100 Bill, cl 83; Explanatory notes, p 30.

101 Submission 26, p 12.

102 Submission 35, pp 2-3.

103 Submission 26, p 12.

In response to concerns about the advisory committee, the QT advised:

> *…There is no maximum limit for the number of persons to be appointed to the advisory committee. That is a decision for the Minister… The Minister may decide to appoint two representatives from the resources sector from both petroleum and gas and mining. It is not considered necessary to provide any further restrictions on the Ministers discretion to appoint suitably qualified persons to the advisory committee.*
>
> *A terms of reference and other information relevant to the advisory committee will be circulated following the passage of the Bill.*[104]

3.1.5 Financial assurance for prescribed ERAs

The Bill proposes to largely retain the existing financial assurance arrangements for EAs for prescribed environmentally relevant activities (ERA) such as oil refining or processing, dredging and extracting activities, metal smelting and refining, mineral processing, waste disposal or regulated waste recycling, reprocessing, storage or treatment.[105]

The Bill provides that the DES, as the administering authority, may impose a condition on the EA that a relevant activity must not be carried out under the EA unless the holder has paid financial assurance as security for:

- compliance with the EA, and
- costs and expenses to prevent or minimise harm or rehabilitate or restore the environment.

However, a condition requiring financial assurance may only be imposed if the DES is satisfied it is justified considering:

- the degree of risk of environmental harm being caused by the relevant activity
- the likelihood of action being required to rehabilitate or restore, and protect the environment, because of harm caused by the activity, and
- the environmental record of the EA holder.[106]

The amount and form of the financial assurance is determined by the DES.[107]

The Bill provides that if the DES incurs costs and expenses to prevent or minimise harm, rehabilitate or restore the environment or secure compliance with an EA, the DES may make a claim on the financial assurance for that amount (or the amount of the assurance if it is less than the amount claimed).[108]

Before making a claim on or realising an assurance the DES must give the entity written notice outlining the details of the proposed action, the amount to be claimed or realised, and inviting the entity, within a period of at least 20 days, to make written representations about why the assurance should not be claimed or realised. The DES must consider any representations before making a claim on or realising a financial assurance.[109]

If all or part of a financial assurance is realised, and assurance is still required, the holder of the EA must replenish the financial assurance to the amount held before it was realised.[110]

---

104 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 20-21.

105 Bill, cl 173 (ss 307-316); Department of Heritage and Environment Protection, *Financial assurance under the Environmental Protection Act 1994*, www.ehp.qld.gov.au/assets/documents/regulation/era-gl-financial-assurance.pdf.

106 Bill, cl 173 (s 308); Explanatory notes, pp 71-72.

107 Bill, cl 173 (s 310); Explanatory notes, p 72.

108 Bill, cls 67, 173 (s 316D); Explanatory notes, p 27.

109 Bill, cl 173 (ss 316E, 316F); Explanatory notes, p 75.

110 Bill, cl 173 (s 316); Explanatory notes, p 74.

3.1.6 Review of decisions

The Bill does not provide a right for a merits review of decisions made by the scheme manager. A review of the scheme manager's decisions relating to initial risk category allocations, and risk allocation changes because of a change to the EA holder or the annual review are available under the *Judicial Review Act 1991* (JR Act).[111] Reviews under the JR Act are limited to an examination of whether the scheme manager had the power or jurisdiction to make a decision and whether the power was lawfully exercised.[112] Decisions of the scheme manager are otherwise final and conclusive unless affected by jurisdictional error under the JR Act.[113]

Decisions made under the EP Act to amend a PRCP schedule, to make a claim on or realise a financial assurance for a prescribed ERA, and ERC decisions are reviewable under the 'existing appeal and review rights under the EP Act'.[114] This process includes the right to apply for a review of a decision internally by the DES, and appealing against a decision to the Land Court or Planning and Environment Court.[115]

Stakeholder views and the QT response

A number of submitters expressed concern that the Bill does not provide a right for a merits review of decisions made by the scheme manager.[116] For example the QRC submitted:

> *The Government has not accepted the resource sector's position of including a merits review (appeal process) for the risk categorisation decisions, instead only providing for a judicial review process…*
>
> *A merits review also would ensure the quality and consistency of the decisions of the Scheme Manager. The purpose of a merits review is to ensure that the decisions of the Scheme Manager are correct and preferable. Correct, in the sense that they are made according to law and preferable, in that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts. A merits review will ensure fair treatment of all persons affected by a decision. This is important given that this is a brand-new system for establishing environmental credentials and the financial surety that must be paid.*[117]

Similarly, the QLS submitted:

> *The Bill does not provide for an appeal process for decisions made by the scheme manager. While a dissatisfied person can seek judicial review of an initial risk category allocation decision, a changed holder review allocation decision or an annual review allocation decision, the effect of section 75(2) of the Bill is that a decision cannot be challenged or appealed against in any way unless it is affected by jurisdictional error.*
>
> *QLS submits that the grounds of review for scheme manager's decisions should be not be limited in this way, and that there should be a process for appeal or internal review of these decisions.*[118]

In response to suggestions that there should be a right of review regarding decisions of the scheme manager, the QT advised:

> *The Bill does not provide for a right of appeal against the allocation decisions made by the scheme manager under clauses 27, 32 and 38 and the reasons for which are set out in the Explanatory Notes to the Bill and summarised below...*

111 Bill, cl 74; Explanatory notes, p 28.
112 JR Act, s 20.
113 Bill, cl 75; Explanatory notes, p 28.
114 Bill, cl 204; QT, *Departmental Written Brief to Economics and Governance Committee*, attachment 5.
115 EP Act ss 519-539.
116 See for example submissions 9, 25, 32 and 42.
117 Submission 26, p 10.
118 Submission 9, p 5.

The allocation decisions made by the scheme manager are in the nature of a risk rating, based largely on the likelihood of the State incurring costs and expenses if a holder of an authority fails to comply with their environmental management or rehabilitation obligations. The process affords a review through a two-stage decision making process that allows a holder to make submissions on an indicative decision before the final decision is made. The scheme manager is required to provide the holder with an indicative risk category allocation including reasons for the proposed risk category allocation. The holder then has a reasonable period to make a submission to the scheme manager before a final decision is made. Importantly the decision is made anew on an annual basis.

…the scheme manager's allocation decisions are subject to the Judicial Review Act 1991 (JR Act) and under clause 74 and 75 of the Bill this affords the holder or incoming holder rights under the JR Act as they are the only entities directly affected by these scheme manager decisions.[119]

3.1.7 Publicly available information

Public registers

The Bill provides that the DES must keep a register of, among other things, the following:

- EAs, including surrendered, suspended or cancelled authorities
- progressive rehabilitation and closure plan (PRC plan) and PRCP schedules no longer in effect because the EA has been cancelled or surrendered
- audit reports of progressive rehabilitation and closure plan schedule (PRCP schedule)
- submitted plans of operations
- ERC decisions for environmental authorities
- annual returns for EAs and any required evaluations
- information notices given in relation to financial assurance for prescribed ERAs.[120]

The register must be open for public inspection during office hours and a person must be able to take extracts from the register or, on payment of the fee, be given a copy of the register or part of it.[121]

Stakeholder views and the QT response

The majority of submitters and witnesses did not make representations about the proposed amendments to the public register. However, a number made representations about ensuring public scrutiny of decisions[122] and Lock the Gate Alliance and the EDO, in a joint submission, stated additional information should be required to be kept in the public register:

- *Rehabilitation Audits;*
- *Progressive rehabilitation certification reports;*
- *ERCs must be made public for all EAs and should include a summary of the area of disturbance and proposed rehabilitation works on which the estimated rehabilitation costs (ERC) was based;*
- *Amended EA's (sic) and PRC Plans;*
- *the actuarial review under cl 73;*
- *any information provided to decision maker … on financial assurance (FA) or EA or PRC plan.*[123]

---

119 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 3-4.

120 Bill, cl 201, EP Act s 540; Explanatory notes, pp 87-88.

121 EP Act ss 540-542.

122 See for example submission 1, 3, 6, 11, 13, 15, 16, 18, 20, 27, 36, 39.

123 Submission 16, p 7.

In response to submissions the QT advised that the Bill does not change 'information that can currently be publicly accessed'[124] and:

> *The information made publicly available on the public register is intended to help build the community's confidence and trust, and the selection of information included is intended as a balance of stakeholder views, including confidentiality concerns to section 540.*
>
> *…*
>
> *The public register includes the ERC decision. The allocation decisions made by the scheme manager are based on statutorily required commercial-in-confidence information from the authority holders. Much of this information is highly sensitive, not publicly available and could have significant consequences for the company if it was released publicly.*
>
> *Progressive rehabilitation certification reports relating to a PRCP schedule will be included in the register for the EA and schedule (s318ZJ(1)(a)(i) and (ii)).*[125]

Right to information

The Bill provides that the *Right to Information Act 2009* (RTI Act) does not apply to the scheme manager as an entity or to all documents created or received by the scheme manager under part 3 of the proposed new Act (relating to the operation of the financial provisioning scheme).

The proposed exclusion from the RTI Act would mean that the public does not have 'a right of access to information in the government's possession or under the government's control'.[126] This right applies to information under the RTI Act unless, on balance, it is contrary to the public interest to give the access to the information.

The explanatory notes state that the exclusion from the RTI Act:

> *…respond to significant concerns raised by industry stakeholders about the potential for disclosure of sensitive financial and business information and documents which would ordinarily only be provided to financial institutions for obtaining financial assurance under the current arrangements under the EP Act. These exemptions will allay holders' concerns that their confidential corporate and financial documents (including potentially details of their joint venture arrangements) provided to the scheme manager could otherwise be publicly available.*[127]

Stakeholder views and the QT response

The majority of submitters and witnesses did not make representations about the proposed amendments to the RTI Act, however those that did expressed differing views.

The QRC expressed support for the amendments:

> *The Right to Information Act amendments, which are significant and positive changes regarding confidentiality concerns industry has had with the need to protect the materials provided to the Scheme Manager (Clauses 216, 217, 218 and 17).*[128]

Conversely, some submitters highlighted the need for public scrutiny of risk assessments and financial assurance.[129] For example, Lock the Gate Alliance and the EDO, in a joint submission, stated:

---

124 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 5.

125 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 40-41.

126 RTI Act, s 3.

127 Explanatory notes, p 99.

128 Submission 26, p 6.

129 See for example submissions 1, 3, 13, 15, 16, 18, 19, 24, 26, 33, 36 and 39.

> *Public transparency and accountability in decision making processes are crucial to ensure the quality of decision making and process undertaken. The management of the risks faced by the State by resource activities is a public interest matter and must be treated as such, with provision for public scrutiny and involvement in decision making.*[130]

Comparably, the Office of the Information Commissioner (OIC) noted that 'government information is a public resource and that openness in government enhances the accountability of government'[131] and expressed concern:

> *…if you have a continual chipping away at the legislation there is a risk that it really reverts to the scheme that came before the Right to Information Act and what the Right to Information Act was really designed to overcome.*[132]

The OIC submitted that:

> *...the approach taken in amending the RTI Act is inconsistent with the scheme of the legislation, the stated objective of the amendments, the extent of the proposed confidentiality provision in the Bill, the conclusions of the recent comprehensive review of the RTI Act tabled in Parliament by the Attorney-General in October 2017, and the Solomon Report [Review Report].*
>
> *…*
>
> *This Review Report recommended there be no further exemptions or exclusions and, in fact, recommended the removal of an existing exemption (Recommendation 6). ... The proposed amendments are therefore inconsistent with the recent Review Report.*
>
> *It is critical that individual legislative proposals are considered in the context of the broader policy and departures from such are clearly justified. In this case the explanatory notes do not provide a compelling case to justify an exclusion from the operation of the RTI Act contrary to recent policy expressed by the Attorney-General's Review Report.*[133]

Further, the OIC expressed a view that 'a blanket exclusion for documents created, or received, by the scheme manager and the scheme managers (sic) functions appears unnecessary'.

> *…provision exists in the RTI Act for information to be exempt where disclosure is prohibited by an Act. ... If Parliament considered that disclosure of the relevant information would, on balance, be contrary to the public interest, the outcome being sought by the proposed amendments … could be achieved by prescribing the relevant elements of the confidentiality provision regarding commercially sensitive documents in Schedule 3, section 12 of the RTI Act.*[134]

In response to the submissions regarding the proposed amendments to the RTI Act, the QT advised:

> *The exclusions to the RTI Act are narrow in scope and provide protection to commercial-in-confidence information statutorily required by the scheme manager for the purposes of risk category allocation. Much of this information is highly sensitive, not publicly available and could have significant consequences for the company if it was released publicly…*
>
> *However, third parties will have access to information about the scheme as a whole through the scheme manager's published annual report, which must include information about actuarial investigations of the scheme…*
>
> *The approach taken to utilise the exclusion mechanism under the RTI is considered the more appropriate means to address this critical issue.*[135]

---

130 Submission 16, p 8.

131 Submission 33, p 5.

132 Public hearing transcript, Brisbane, 28 March 2018, p 17.

133 Submission 33, p 4.

134 Submission 33, p 5.

135 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 46-47.

The QT also advised:

> *The Bill does not otherwise (directly or inadvertently) make any changes to information that can currently be publicly accessed under the EP Act or any of the resource legislation.*[136]

3.1.8 Commencement and transitional arrangements

The Bill provides that the legislative framework for the new financial provisioning scheme will commence by proclamation. The QT has advised that it is intended that the scheme commence on 1 July 2018.[137]

The Bill also outlines transitional provisions to transfer operators under the existing financial assurance arrangements to the new scheme. The process to transition an operator to the new scheme will commence with the scheme manager giving the operator a transition notice stating that the scheme manager intends to start the process of determining the EA's risk allocation category. A transition notice must be given for all relevant EA holders within three years of commencement of the proposed new Act.[138]

Stakeholder views and the QT response

A number of submitters suggested that the commencement of the new financial provisioning scheme should be delayed beyond the proposed 1 July 2018 commencement date.[139] For example, the QRC submitted:

> *…the commencement timeframe for the new financial provisioning framework is too short, at 1 July 2018…*
>
> *…*
>
> *…the amount of work in such a compressed timeframe is unrealistic and only appears to be so for political reasons.*[140]

In response to these concerns, the QT advised:

> *The Bill provides for the Act to commence by proclamation. The date for the commencement of the financial provisioning scheme is planned for 1 July 2018 and this has been communicated to stakeholders during consultation. Further discussion with individual holders regarding initial risk allocation timing during the three-year transition period will occur following passage of the Bill.*[141]

Some concerns were also raised regarding the transition to the new financial provisioning scheme. For example, the QRC submitted:

> *[T]he Bill is not clear that a bank guarantee instrument or cash surety (whichever is applicable) will be returned once the allocation decision has been made (following the issuing of the transition notice), if it is determined that the amount relative to the ERC is to be paid into the Fund, and that amount is so paid.*[142]

---

136 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 5.

137 Bill, cl 2; QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquir*y, p 3.

138 Bill, cls 89-92; Explanatory notes, p 32.

139 See for example submissions 26, 35, 43, 44.

140 Submission 26, p 5.

141 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquir*y, p 3.

142 Submission 26, p 11.

In response to this concern, the QT advised:

> *Following a risk category allocation, the scheme manager will request either a contribution to the fund or for an appropriate surety to be provided. If a contribution to the fund is requested and paid, existing surety/s will be returned to the holder. The existing provisions are believed to be sufficient for this purpose. However, to remove any confusion an amendment to the Explanatory Notes can be made.*[143]

3.2 Rehabilitation reforms

3.2.1 PRC plans

The Bill proposes to introduce mine rehabilitation reforms, the 'key pillar' of which is the introduction of a requirement for operators to develop a PRC plan as part of the application process for a site specific EA for a mining lease.[144]

The main purposes of a PRC plan are to require EA holders to plan for how and where environmentally relevant activities will be carried to maximise the progressive rehabilitation of the land to a stable condition, and to provide for the condition to which the EA holder must rehabilitate the land.[145] The Bill provides that land is in a stable condition if it is safe and structurally stable, there is no environmental harm being caused and the land can sustain a post-mining land use.[146]

Under the requirements of the Bill PRC plans will have two main components; a rehabilitation and planning part and a proposed PRCP schedule. The rehabilitation and planning part of the plan will:

- describe the mining lease including the area of the tenure
- describe the relevant activities including their duration, how and where they will be carried out
- outline consultation activities undertaken in developing the PRC plan and how ongoing consultation will be undertaken about rehabilitation
- identify proposed post-mining land uses and non-use management areas, and state the extent to which the proposed post-mining land uses and non-use management areas are consistent with the outcome of consultation in developing the plan and any strategies or plans for the land of the local government, State or Commonwealth
  - for each post-mining land use, state how progressive rehabilitation will be carried out to achieve a stable condition, including the techniques or methodologies to be used and identifying how risks in achieving the post-mining land use will be minimised or managed
  - for proposed each non-use management area, state the reasons the applicant considers the area is not able to be rehabilitated to a stable condition, the evidence relied on and the methodology for achieving best practice management of the area.[147]

The requirement to develop a PRC plan is integrated into the existing EA process for new site specific EA applications to 'minimise the regulatory burden on Government and industry'.[148]

---

143 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 21.

144 Bill, cls 101 – 104; Explanatory notes, p 3.

145 Bill, cl 104 (s 126B); Explanatory notes, p 35.

146 Bill, cl 98; Explanatory notes, p 33.

147 Bill, cl 104 (s 126C); QT, *Departmental Written Brief to Economics and Governance Committee*, attachment 6.

148 Explanatory notes, p 3.

Stakeholder views and the QT response

Submitters and witnesses were generally supportive of the intent of progressive rehabilitation. For example, the Wide Bay Burnett Environment Council submitted that it supports that the Bill:

> *…requires resource proponents to explicitly plan up front how they intend to leave a site once they have finished mining it through a Progressive Rehabilitation and Closure Plan (PRC Plan).*[149]

Similarly, Peabody Energy Australia submitted:

> *Peabody Australia is supportive of the progressive rehabilitation of mining operations as areas become available to commence the rehabilitation process, and we have made great strides in recent times to perform rehabilitation work on available areas at our mining operations.*[150]

However, a number of submitters raised concerns regarding non-use management areas and final voids.[151] For example, the Australian Marine Conservation Society submitted:

> *The Bill, as drafted, will still allow for holes ('voids') from mining a site to be left unfilled, rather than placing an obligation on miners to fill these voids in and rehabilitate all land as exists in other countries, such as the USA. Queensland should not be left with holes throughout the State, when the filling of these voids could be factored into the costs of the mine from the start? The companies that have profited from digging the holes and mining our resources must bear the cost of filling those holes and rehabilitating all of the land that was impacted.*[152]

Similarly, Nigel Parratt, representing WWF Australia stated at the public hearing:

> *While the Department of Environment and Science has stated that non-use management areas will only be approved under limited circumstances, as I mentioned earlier, there is a significant risk that mining companies will view non-use management areas as a loophole that they can potentially exploit to minimise the cost of rehabilitating mine sites. Along with the ongoing risks to Queensland taxpayers, adjacent landholders and the environment, enabling mining companies to avoid having to fully rehabilitate their mine site utterly undermines the intent of this legislative reform, which, as the previous speaker said, is all about making sure that mine sites are returned to a sustainable and stable post-mining land use.*[153]

In response to concerns regarding non-use management areas and final voids, the QT advised:

> *The allowance for non-use management areas acknowledges that in restricted circumstances land will be unable to support a post-mining land use.*
>
> *…*
>
> *If a void is rehabilitated to a landform that is safe and stable, does not cause environmental harm, and is able to sustain a post-mining land use, then the void will no longer be considered a 'final void', rather that void will now be used for the post mining land use it was rehabilitated to.*
>
> *For new sites, a PRCP schedule will not be approved if it proposes a final void as a non-use management area, where that area is located within a floodplain.*
>
> *…*
>
> *Exclusion of non-use management areas from the Mined Land Rehabilitation Policy was not considered appropriate because unlike the USA's Surface Mining Control and Reclamation Act 1977 (which applies to surface (open cut) coal mining), the Queensland legislation applies across a wider range of commodities and practices in the mining sector.* [154]

---

149 Submission 3, p 2.

150 Submission 42, p 9.

151 See for example submissions 2, 5, 8, 10, 14, 15,16, 24, 25, 28, 34, 37, 39, 45, 48, 51.

152 Submission 1, p 2.

153 Public hearing transcript, Brisbane, 28 March 2018, p 13.

154 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 23-26.

PRCP schedule

Each PRC plan must include a proposed PRCP schedule, stating the proposed post-mining land use for each area or that the applicant considers the land to be a non-use management area and including maps of the land.[155] Land may only be categorised as a non-use management area if:

- carrying out rehabilitation would cause a greater risk of environmental harm than not carrying it out, or
- the risk of environmental harm as a result of not carrying out rehabilitation is confined to the area of the resource tenure, and failing to rehabilitate the land to a stable condition is justified considering the costs of rehabilitation and the public interest in the resource activity being carried out.

However, if land will contain a void[156] in a flood plain the schedule must provide for rehabilitation of the land to a stable condition; it may not be categorised as a non-use management area.

For each rehabitable area, the PRCP schedule must state each rehabilitation milestone necessary to achieve a stable condition for the land and when each milestone is to be achieved. The schedule must provide for the achievement of each milestone as soon as practicable after land becomes available for rehabilitation. This occurs if the land is not being mined unless the land:

- is being used for operating infrastructure or machinery for mining, such as a dam or water storage facility
- is identified, in the proposed PRCP schedule or the application for an EA, as containing a resource to be mined within 10 years after it would otherwise be available for rehabilitation
- contains permanent infrastructure identified in the schedule as remaining on the land for a post-mining land use.

For each non-use management area, the PRCP schedule must state each management milestone and when each milestone is to be achieved.[157]

Once approved, the PRCP schedule remains in force until the EA to which it relates is cancelled or surrendered.[158] However, the holder of a PRCP schedule may apply to the DES at any time to amend the schedule.[159] The process for amending a PRCP schedule varies depending on whether the amendment is minor or major. A major amendment is one that:

- changes a post-mining land use or non-use management area
- affects whether a stable condition will be achieved
- changes the way a post-mining land use will be achieved, or a non-use management area will be managed, in a way likely to result in significantly different impacts on environmental values compared to the impacts before the change
- relates to a new mining tenure
- changes when a rehabilitation milestone or management milestone will be achieved by more than five years after the time stated when the schedule was first approved
- extends the day by which rehabilitation of land to a stable condition will be achieved.[160]

155 Bill, cl 104 (ss 126C, 126D); Explanatory notes, pp 35-38.

156 A void is defined as an area of land excavated in carrying out a mining activity.

157 Bill, cl 104 (s 126D); Explanatory notes, pp 36-38.

158 Bill, cl 125; Explanatory notes, p 47.

159 Bill, cl 144; Explanatory notes, p 54.

160 Bill, cl 143; Explanatory notes, pp 53-54.

The explanatory notes state that the characteristics of a major amendment are 'designed to ensure an assessment of changes to environmental risks, social risks and rehabilitation acceptability can be made by the administering authority'.[161] Major amendment applications must be publicly notified to ensure the community is consulted for major changes to rehabilitation outcomes or timeframes, and will go through the assessment stage where the DES may request additional information.[162]

Additionally, the DES may, after following the prescribed process, amend a PRCP schedule:

- to correct a clerical or formal error
- to ensure compliance with conditions in a determination made by the National Native Title Tribunal
- to ensure it is consistent with a regional interests development approval for the activity under the *Regional Planning Interests Act 2014*
- if it considers the amendment is necessary or desirable because of certain matters such as the contents of an audit report for the schedule, or contravention of the EP Act or environmental offence committed by the schedule holder.[163]

Information on rehabilitation progress will continue to be provided through annual returns. An annual return for an EA with a PRCP schedule must include an evaluation of the effectiveness of the schedule including whether the holder has complied with the conditions of the PRCP schedule and whether the rehabilitation or management milestones to be achieved during that year were met.[164]

Stakeholder views and the QT response

Milestones

Some submitters stated that rehabilitation milestones should have 'limited flexibility to provide certainty of enforceability'.[165] Other submitters raised concerns regarding the appropriateness of time-based milestones for all rehabilitation activities. For example BHP submitted:

> *Any requirement for mine operators to adhere to rigid rehabilitation areas (hectares) and timeframes is incompatible with the variable nature of the mining industry and mine planning practices. The timeframe within which a mine plan progresses — and therefore the timeframe within which rehabilitation outcomes can be reached — can vary depending on a number of factors, including commodity prices, geotechnical considerations and development costs.*[166]

BHP expanded on this at the public hearing stating:

> *The areas that you mine, when you mine them and how you mine them changes over a period of time according to market conditions, exchange rates and geotechnical considerations. We are not suggesting that we want to walk away from obligations around rehabilitation. What we are absolutely looking for is a practical application so that we are not locked in to rehabilitating certain areas within certain time frames, given that we may well want to mine those areas in five, 10 or 15 years time.*[167]

161 Explanatory notes, p 53.

162 Bill, cl 143; Explanatory notes, pp 53-54.

163 Bill, cls 133-136; EP Act ss 211-221; Explanatory notes, pp 50-51.

164 Bill, cl 173 (s 316J); Explanatory notes, p 77.

165 Submission 16, p 4.

166 Submission 31, p 2.

167 Public hearing transcript, Brisbane, 28 March 2018, p 21.

Similarly, the QRC submitted:

> *Establishing time-bound targets is suitable for some milestones, such as landform development and cover placement, which can be better planned and managed by a proponent. However, this approach is not always feasible for other milestones, particularly activities associated with vegetation growth, given there are too many external variables (e.g. weather) outside of the proponent's control that can affect the progress and success.*[168]

The QRC also raised a concern about the definition of 'rehabilitation milestone', submitting:

> *The definition does not adequately reflect the Government's intent for a rehabilitation milestone to be binding, enforceable, time-based, provide transparency on progress, and allow progress to be reported.*
>
> *…*
>
> *The definition should be re-drafted to "A significant event or step in the rehabilitation process that is able to be used to measure and demonstrate the progress of rehabilitation over time"…*[169]

The response from the QT regarding these issues included advice that:

> *The milestones in the Bill are designed to achieve the policy intent. Having enforceable milestones is one of the key aspects of the reforms and it is directly related to the policy intent of the reforms. Considering that, milestones need to be designed with enough specificity to allow for necessary enforcement and compliance.*
>
> *Milestones in the PRCP schedule will be designed in a way that incorporates potential uncertainties related to the activities. In addition, areas, timeframes and milestones will be proposed by EA holders considering the activities at the site, which allows for some flexibility.*[170]

Amending a PRCP schedule

Some submitters and witnesses raised concerns regarding the process for amending a PRCP schedule and the definitions of major and minor amendments. For example, the QRC submitted:

> *…the Bill fails to accommodate a routine review and update process to refine longterm milestones in the PRCP schedule without it being considered as a major amendment with full submission and objection rights…*[171]
>
> *…the administering authority should have a broader scope to their discretionary rights to:*
>
> - *Assess a major PRCP amendment as a minor amendment despite it being inconsistent with the minor amendment (PRCP threshold); or*
> - *Decide whether a major PRCP amendment needs to proceed to public notification...*[172]

Similarly, BHP submitted:

> *…the definition of 'minor amendment (PRCP threshold)' should be amended to include a materiality threshold. Major amendments should be triggered only by a material change to community expectations or the environmental outcome of rehabilitation activities.*[173]

168 Submission 26, p 30.

169 Submission 26, p 24.

170 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 40.

171 Submission 26, p 29.

172 Submission 26, p 32.

173 Submission 31, p 31.

In response to these concerns the QT advised that the definitions of major and minor amendments 'achieves a balance between stakeholder views', and:

> *All major amendment applications will be required to be publicly notified to ensure the community is consulted in the event of major changes to the rehabilitation outcomes or the timeframes for delivering those outcomes previously consulted on.*
>
> *…*
>
> *Achieving milestone dates is considered a critical component of a PRCP schedule and the flexibility afforded by allowing five additional years without triggering a major amendment is considered sufficient.*
>
> *…*
>
> *During the course of a mining operation, changes may be proposed to the mine path due to a number of operational needs… where an amendment is to the re-sequence (changing the order, not the processes or outcomes) of 2 or more rehabilitation areas and their respective dates for completion, then the administering authority can decide it is a minor amendment application if it is satisfied the applicant has undertaken adequate consultation with the community and the change would not result in submissions objecting to the amendment.*[174]

Audits

The holder of a PRCP schedule must commission an approved rehabilitation auditor to audit the schedule every three years. The auditor's report, together with a declaration that the holder has given all relevant information to the auditor and has not knowingly provided any false or misleading information, must be given to the DES within four months after each three year audit period ends.

The audit report must include:

- a statement about whether the EA holder has complied with the PRCP schedule during the audit period, including details of actions the holder has taken, or failed to take, in relation to the schedule milestones, whether the holder has complied with conditions imposed on the schedule and whether information given to the DES about rehabilitation activities is accurate
- an assessment of whether the post-mining land use is likely to be achieved, considering the rehabilitation that has been and is to be carried out under the PRCP schedule
- recommendations about actions the EA holder should take to ensure milestones are achieved or conditions of the PRCP schedule are complied with, and
- other information the DES reasonably considers necessary to decide whether to take action to amend the PRCP schedule.[175]

Stakeholder views and the QT response

The majority of submitters and witnesses did not make representations about the audit requirements. However, BHP raised a concern about the requirements for the auditor to make recommendations about future actions and whether the post-mining land use is likely to be achieved:

> *As an audit is, by definition, against a standard, including these requirements on an auditor is unreasonable and impractical. Requesting an auditor to express an opinion about potential future outcomes, in respect of which they have not observed any evidence, is not an audit and is outside the remit of most auditors' experience and expertise and is therefore impractical.*
>
> *There are adequate measures in the Bill to incentivise and ensure compliance by operators. The requirement to have an auditor speculate on future compliance is unnecessary and adds no substantive benefit.*[176]

---

174 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 3.

175 Bill, cl 173 (ss285-286); Explanatory notes, pp 63-64.

176 Submission 31, p 14.

In response to this suggestion, the QT advised:

> *The audit report will contain an assessment of whether the holder has progressed towards the milestones approved in the PRCP schedule and whether the holder has complied with conditions imposed in the schedule. It will also include any recommendations about any actions the holder should take to achieve milestones in the schedule and an assessment of whether the post-mining land uses are likely to be achieved based on the current rehabilitation activities being taken. This latter assessment is valuable in identifying corrective actions that can be most efficiently achieved if identified early.*
>
> *The audit report will be used by the administering authority to determine if an amendment to a PRCP schedule is required to ensure progressive rehabilitation towards post-mining land uses or that ensure non-use management areas are being appropriately managed.*[177]

3.2.2 Commencement and transitional arrangements

The Bill provides that the legislative framework for the new rehabilitation arrangements will commence by proclamation no later than 1 July 2019.[178] To allow a staged commencement of the provisions 'PRC plans will not have to be complied with until a date prescribed by regulation that is no later than 1 July 2019'.[179]

The Bill also outlines transitional provisions to transfer to the new PRC plan requirements. The process to transition an EA to the new PRC plan requirements will commence with the scheme manager giving the EA holder a transition notice stating that the holder must submit a proposed PRC plan and the date by which the plan must be submitted.[180] The explanatory notes state that 'it is expected that the timeframe will range between 6 and 12 months depending on the complexity of the site and current environmental authority'.[181]

A notice must be given to existing EA holders within three years of commencement of the provisions, which will ensure all relevant EA holders have started the transition to the new PRC plan requirements within three years.[182]

The explanatory notes state 'it is expected that the department will be developing a list to inform the sequence of sites to be transitioned'. The QT further advised the committee:

> *The list will be based on factors such as the status of the mine, the size of the mine, the expiry date of the current plan of operations, departmental assessment office resourcing and other matters.*[183]

Stakeholder views and the QT response

Submitters and witnesses were generally supportive of a staged transition to the new PRC plan requirements. For example, the QRC submitted:

> *…QRC does commend Government for recognising the need, and providing additional time, for the supporting guidance materials to be developed and tested prior to formal implementation of the PRCP legislative framework across a three-year period.*

177 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, pp 36-37.

178 Bill, cls 2, 203.

179 Explanatory notes, p 88.

180 Bill, cl 203 (ss 750-765); Explanatory notes, pp 88-91.

181 Explanatory notes, p 90.

182 Bill, cl 203 (s 754); Explanatory notes, p 90.

183 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 42.

QRC also supports the Government proposal to draw up a formal schedule for the transition of each Environmental Authority into the Scheme, along with the preparation and implementation of the accompanying PRCP for site-specific mines. This is a critical part of company planning… [184]

Existing operations

Some submitters raised concerns regarding how the requirements would be applied to existing operations. For example Peabody Energy Australia submitted:

Existing final landforms and rehabilitation criteria, especially those described in an existing EA must not be changed in any way. To do so would generate significant sovereign risk.

…

The imposition of the PRC Plan and associated PRC Schedule on existing operations and a requirement that DES consider it as though it had accompanied an application for an EA undermines the pre-existing rights of those operations. [185]

In response to these concerns, the QT advised:

The intent of section 755 is to:

(a) provide the process for assessing and deciding on transitional PRC plans

(b) preserve existing rehabilitation outcomes (including approved non-use management areas such as residual voids in floodplains) in approvals

(c) ensure the notification stage does not apply if there is no change from those existing approved rehabilitation outcomes (either EIS or EAs) if consultation was carried out on those outcomes. [186]

The QT also emphasised:

The section was not intended to breach the fundamental legislative principle of retrospectivity, rather it was drafted to ensure existing rights are preserved. [187]

Minimum timeframe to develop PRC plan

Some submitters and witnesses also expressed the view that there should be a minimum period for an EA holder to be required to provide a PRC plan. For example the QRC submitted:

- *A minimum timeframe (preferably 12 months) be specified in Section 754; and (at this stage)*
- *The above decision be listed as an Original Decision in Schedule 2, so that if an officer imposes an unreasonable timeframe in terms of the complexity of the site (quite likely, having been unaware of the complexity of the issues), there is a simple opportunity for internal review of this decision.* [188]

The QT advised:

The minimum timeframe for sending notices was removed from the Bill as a result of consultation to provide flexibility in the transition process. The intent is that DES will work with operators and tailor the date to the operator's needs as well as assessment centre resourcing needs. [189]

184 Submission 26, p 2.

185 Submission 42, p 9.

186 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 43.

187 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 43.

188 Submission 26, p 37.

189 QT, correspondence dated 16 March 2018, *Advice to the Economics and Governance Committee regarding submissions to inquiry*, p 42.

3.3 Container recycling scheme

The Bill proposes to amend the *Waste Reduction and Recycling Amendment Act 2017* to delay commencement of the container recycling scheme from 1 July 2018 to 1 November 2018. The change to the commencement has been made 'following consultation with beverage manufacturers, the recycling sector and local governments … to ensure a successful container refund scheme is delivered on commencement'.[190]

Stakeholder views

The majority of submitters and witnesses did not make representations about the container recycling scheme. The Local Government Association of Queensland submitted that it supported delaying the scheme's commencement date, noting the proposed extension allows local governments additional time to respond to a range of 'outstanding matters' including:

i the importance to have planning scheme consistency while ensuring local government retains the ability to manage planning processes for refund and donation facilities;

ii the finalisation of agreements and protocols to manage the contractual arrangements between councils and material recovery facilities;

iii the development of an effective and timely state-wide communication strategy;

iv the challenges of managing littering near refund facilities; and

v the importance of ensuring transparency and exchange of information (including audit results) during the rollout of the scheme.[191]

3.4 Administrative, technical and clarifying amendments

The Bill proposes a range of amendments that seek to support the operation and administration of the proposed new Act including:

- providing that it is an offence to provide false or misleading information to the scheme manager[192]
- protecting confidential information, such as information about a person's commercial or financial affairs, by providing that it is an offence to improperly use or disclose confidential information[193]
- providing that the scheme manager may approve forms for use under the new Act and may delegate their functions to an appropriately qualified person[194]
- consequential amendments to the Mine*ral and Energy Resources (Common Provisions) Act 2014* and the *Mineral Resources Act 1989* to reflect the introduction of the new Act and amendments to the EP Act.[195]

190 Hon Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships, Record of Proceedings, 15 February 2018, p 102.

191 Submission 29, p 1.

192 Bill, cls 77-78; Explanatory notes, p 29.

193 Bill, cls 79-82; Explanatory notes, pp 29-30.

194 Bill, cls 84, 86; Explanatory notes, pp 30-31.

195 Bill, cls 206-215; Explanatory notes, pp 97-98.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LS Act) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to the rights and liberties of individuals, and the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill, and brings the following to the attention of the Legislative Assembly.

4.1.1 Rights and liberties of individuals

Review or appeal rights

The Bill does not provide a right for a merits review of decisions made by the scheme manager. Scheme manager's decisions relating to initial risk category allocations, and risk allocation changes because of a change to the EA holder or the annual review are reviewable under the JR Act.[196]

Not providing operators a right of review for decisions made by the scheme manager potentially breaches the FLP regarding administrative power being subject to appropriate review.[197] For legislation affecting rights and liberties 'a merits-based review is the most appropriate type of review'.[198]

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

> *In these circumstances any merits review would, at best, involve a review of the material considered by the scheme manager, rather than a reassessment independent from the scheme manager. However, the ERC decision made by the administering authority, which forms the basis of the calculation of the amount of contribution payable or surety given, is subject to merits review under the EP Act, consistent with the current framework.*
>
> *However, the Bill does afford procedural fairness to holders through a two-stage decision making process. The scheme manager is required to provide the holder with an indicative risk category allocation, including reasons for the proposed risk category allocation. The holder will then have a reasonable period to provide further information or submissions to the scheme manager before a final decision is made.*
>
> *The scheme manager's allocation decisions will be subject to the Judicial Review Act 1991 (JR Act), subject to the limitation that only the holder (or incoming holder) will have rights under the JR Act in accordance with clauses 74 and 75. This is reasonable in the circumstances as only those entities are affected by the scheme manager's decision.*[199]

Penalties for offences

The Bill provides for the introduction of a range of offences.

The introduction of new offences potentially breaches the FLP that consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied. Penalties must be proportionate to the offence.[200]

196 Bill, cl 74; Explanatory notes, pp 5-6.

197 LS Act, s 4(3)(a).

198 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 18.

199 Explanatory notes, p 6.

200 LS Act, s 4(2)(a); OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 120.

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

> *The Bill contains a number of new offences which are appropriate, reasonable and proportionate and relevant to the action to which the penalty is applied. Each offence is comparable to similar current offences in other legislation and therefore does not represent a breach of FLP.*[201]

Power of entry

Clause 191 provides that an authorised person can enter a place if it is a place to which a PRCP schedule relates and an authorised person has given at least five business days written notice stating the purpose of the entry and the day and time the entry is to be made.[202]

Providing authorised persons with these entry powers potentially breaches the FLP regarding the conferral of power to enter premises, and search for or seize documents or objects, only with a warrant.[203]

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

> *…given that this provision already applies to authorities, the amendment only ensures that it may be used for requirements that have been moved, or are now in a PRCP schedule. This is justified as it is consistent with the existing power to enter a place to which an authority relates, only in limited circumstances after meeting strict pre-requisites.*[204]

Immunity from civil liability

Clause 85 provides that the scheme manager, acting scheme manager, person to whom the scheme manager's functions are delegated and members of the advisory committee are not civilly liable for acts or omissions performed in good faith in an official capacity. Civil liability instead would attach to the State.[205]

The proposed amendment protecting the specified persons from civil liability potentially breaches the FLP regarding conferral of immunity. Legislation should not confer immunity from proceeding or prosecution without adequate justification.[206] 'If protection is needed for persons administering Queensland legislation … it is usually declared to be shifted to the State'.[207]

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

> *…protection from liability is only provided to persons performing functions under the Bill. The immunity is limited in scope and liability for the consequences of acts done, or omissions made, is not extinguished under the Bill but instead attaches to the State, and legal redress remains open. On this basis, the protection from liability, is considered justified and not a breach of a FLP.*[208]

Unambiguous legislation drafted in a clear and precise way

Legislation should be unambiguous and drafted in a sufficiently clear and precise way.[209] The wording must withstand attempts by readers to find unintended interpretations.[210] If the meaning or application of a statutory definition is unclear, there is a serious risk of confusion in the interpretation of provisions.[211]

---

201 Explanatory notes, p 7.

202 Bill, cl 191; EP Act, s 452; Explanatory notes, p 8.

203 LS Act, s 4(3)(e); OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 44.

204 Explanatory notes, p 8.

205 Bill, cl 85; Explanatory notes, p 9.

206 LS Act, s 4(3)(h).

207 OCPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 62.

208 Explanatory notes, p 9.

209 LS Act, s 4(3)(k).

210 OQPC, *Principles of good legislation: OPQC guide to FLPs, Clear Meaning*, paras 1-2

211 OQPC, *Principles of good legislation: OPQC guide to FLPs, Clear Meaning*, para 59.

Clause 173, proposed new section 316J (Particular requirement for annual return if PRCP schedule applies) contains a minor drafting error; in subsection 2 the provision refers to an 'annual report' rather than an 'annual return'.

The committee recommends the Bill be amended to correct the drafting error.

Recommendation 2

The committee recommends clause 173 of the Mineral and Energy Resources (Financial Provisioning) Bill 2018 be amended to correct a minor drafting error.

4.1.2 Institution of Parliament

Clauses 88 and 203 provide for a transitional regulation-making power, enabling transitional regulations to be made to enable or facilitate the transition to the proposed financial provisioning scheme and rehabilitation framework, about which 'the Act does not make provision or sufficient provision'.[212] A transitional regulation may have retrospective operation to a day that is not earlier than the commencement of the Act.

The Bill provides that the sections allowing for the making of transitional regulations and any transitional regulation expires 2 years after commencement of the Bill.

Providing for broad transitional regulation making powers about 'any matter' for which the Act does not make provision or sufficient provision potentially breaches the FLP regarding the delegation of legislative power.

Allowing a regulation to 'make provision about a matter for which this Act does not make provision or enough provision' has been found to be an inappropriate delegation; matters about which transitional regulations may be made should be stated in the Bill. This breach is arguably exacerbated by the provision that the transitional regulations may have retrospective effect; regulation making power to fill legislative gaps is even more objectionable if the regulation may be given retrospective effect.[213] This is also potentially a breach of the FLP that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

> *The inclusion of these clauses is justified because they provide a temporary measure to facilitate a smooth transition to the new frameworks under the Bill. The regulation must be declared as a transitional regulation and it may have retrospective operation for the period. The potential contravention of a FLP is mitigated by the inclusion of a two year sunset clause applying to any transitional regulations and is not considered to be a breach of a FLP.*[214]

4.2 Explanatory notes

Part 4 of the LS Act requires that explanatory notes be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information the explanatory notes should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are reasonably detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

---

212 Bill, cl 88; Explanatory notes, p 9.

213 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, p 154; Alert Digest 2001/7 paras 11-14; Alert Digest 2003/6, paras 16-19.

214 Explanatory notes, p 9.

Appendix A – Submitters

Sub #	Submitter
001	Australian Marine Conservation Society
002	Conondale Range Conservation Association
003	Wide Bay Burnett Environment Council Inc
004	James Jones
005	Gecko Environment Council Association Inc
006	Jonathan Peter
007	Philip Best
008	Clare Grant
009	Queensland Law Society
010	Sue Bradbury
011	Danie and Andy Lomas
012	Confidential
013	Lin Sutherland
014	Georgie and Verdun Spreadborough
015	Form Submission A (40 submitters)
016	Lock the Gate Alliance and the Environmental Defenders Office (joint submission)
017	Dennis Tafe
018	Greg Wood
019	Helen Taylor
020	David Wishart
021	Confidential
022	Adani
023	Confidential
024	Ian Gorrie
025	Richard Kinkead
026	Queensland Resources Council
027	Jess McKinlay
028	WWF Australia
029	Local Government Association of Queensland
030	Rebecca Lambert
031	BHP
032	Rio Tinto Limited
033	Office of the Information Commissioner
034	Queensland Conservation Council

035	Australian Petroleum Production and Exploration Association Limited
036	Elizabeth Hobson
037	Mary River Catchment Coordination Committee
038	Confidential
039	Jonathan Percival
040	Australia Pacific LNG Pty Ltd
041	NRM Regions Queensland
042	Peabody Energy Australia Pty Ltd
043	ConocoPhillips Australia Pty Ltd
044	Origin Energy Resources Limited
045	Mackay Conservation Group
046	The Trustee for the Wilson Family Discretionary Trust
047	Garry Reed
048	Sally Elliot
049	Brisbane Residents United
050	Tess McGilp
051	Form Submission B (1085 submitters)

Appendix B – Witnesses at public briefing and public hearing

Public briefing — 5 March 2018

Queensland Treasury

- Kirsten Vagne, Project Director, Project Management Office, Financial Assurance Framework
- Judith Jensen, Special Counsel, Project Management Office, Financial Assurance Framework

Department of Environment and Science

- Geoff Robson, Executive Director, Strategic Environment and Waste Policy
- Maria Rosier, Manager, Environmental Policy and Legislation

Public hearing — 28 March 2018

NRM Regions Queensland

- Andrew Drysdale, Chief Executive Officer

Queensland Law Society

- James Plumb, Chair of the QLS Mining and Resources Law Committee
- Martin Klapper, member of the QLS Mining and Resources Law Committee
- Vanessa Krulin, Senior Policy Solicitor

Lock the Gate Alliance and Environmental Defenders Office

- Rick Humphries, Coordinator, Mine Rehabilitation Reform Campaign, Lock the Gate Alliance
- Revel Pointon, Solicitor, Environmental Defenders Office

WWF Australia

- Nigel Parratt, Water and Catchment Liaison Project Officer

Office of the Information Commissioner

- Rachael Rangihaeata, Information Commissioner
- Susan Shanley, Acting Assistant Information Commissioner

BHP

- Dominic Nolan, Head of Corporate Affairs
- Matthew Frost, Vice-President, Risk Finance
- Mark Garrahy, Manager, Environment Analysis and Improvement

Queensland Resources Council

- Ian Macfarlane, Chief Executive
- Frances Hayter, Policy Director, Environment
- Chelsea Kavanagh, Policy Manager, Environment